To amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 2007

Mr. WAXMAN (for himself, Mr. PLATTS, Mr. VAN HOLLEN, and Mr. TOM DAVIS of Virginia) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.
SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Whistleblower Protection Enhancement Act of 2007”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Clarification of disclosures covered.
Sec. 3. Covered disclosures.
Sec. 4. Rebuttable presumption.
Sec. 5. Nondisclosure policies, forms, and agreements.
Sec. 6. Exclusion of agencies by the President.
Sec. 7. Disciplinary action.
Sec. 8. Government Accountability Office study on revocation of security clearances.
Sec. 9. Alternative recourse.
Sec. 10. National security whistleblower rights.
Sec. 11. Enhancement of contractor employee whistleblower protections.
Sec. 12. Prohibited personnel practices affecting the Transportation Security Administration.
Sec. 13. Clarification of whistleblower rights relating to scientific and other research.
Sec. 14. Effective date.

SEC. 2. CLARIFICATION OF DISCLOSURES COVERED.

Section 2302(b)(8) of title 5, United States Code, is amended—

(1) in subparagraph (A)—

(A) by striking “which the employee or applicant reasonably believes evidences” and inserting “, without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee’s duties, that the em-
ployee or applicant reasonably believes is ev-

dence of’’; and

(B) in clause (i), by striking ‘‘a violation’’
and inserting ‘‘any violation’’; and

(2) in subparagraph (B)—

(A) by striking ‘‘which the employee or ap-
plicant reasonably believes evidences’’ and in-
serting ‘‘, without restriction as to time, place,
form, motive, context, or prior disclosure made
to any person by an employee or applicant, in-
cluding a disclosure made in the ordinary
course of an employee’s duties, of information
that the employee or applicant reasonably be-
lieves is evidence of’’; and

(B) in clause (i), by striking ‘‘a violation’’
and inserting ‘‘any violation (other than a viola-
tion of this section)’’.

SEC. 3. COVERED DISCLOSURES.

Section 2302(a)(2) of title 5, United States Code, is
amended—

(1) in subparagraph (B)(ii), by striking ‘‘and’’
at the end;
(2) in subparagraph (C)(iii), by striking the pe-
period at the end and inserting ‘‘; and’’; and
(3) by adding at the end the following:
“(D) ‘disclosure’ means a formal or informal communication, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee providing the disclosure reasonably believes that the disclosure evidences—

“(i) any violation of any law, rule, or regulation; or

“(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

SEC. 4. REBUTTABLE PREASSUMPTION.

Section 2302(b) of title 5, United States Code, is amended by adding at the end the following: “For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disin-
interested observer with knowledge of the essential facts
known to or readily ascertainable by the employee or appli-
cant could reasonably conclude that the actions of the
Government evidence such violations, mismanagement,
waste, abuse, or danger.”.

SEC. 5. NONDISCLOSURE POLICIES, FORMS, AND AGRE-
MENTS.

(a) PERSONNEL ACTION.—Section 2302(a)(2)(A) of
title 5, United States Code, is amended—

(1) in clause (x), by striking “and” at the end;

(2) by redesignating clause (xi) as clause (xii);

and

(3) by inserting after clause (x) the following:

“(xi) the implementation or enforcement of
any nondisclosure policy, form, or agreement;
and”.

(b) PROHIBITED PERSONNEL PRACTICE.—Section
2302(b) of title 5, United States Code, is amended—

(1) in paragraph (11), by striking “or” at the
end;

(2) by redesignating paragraph (12) as para-
graph (14); and

(3) by inserting after paragraph (11) the fol-
lowing:
“(12) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement:

‘These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosures to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 and following) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.’;
“(13) conduct, or cause to be conducted, an inves-
vestigation, other than any ministerial or nondis-
cretionary factfinding activities necessary for the
agency to perform its mission, of an employee or ap-
plicant for employment because of any activity pro-
tected under this section; or”.

SEC. 6. EXCLUSION OF AGENCIES BY THE PRESIDENT.

Section 2302(a)(2)(C) of title 5, United States Code,
is amended by striking clause (ii) and inserting the fol-
lowing:

“(ii)(I) the Federal Bureau of Investiga-
tion, the Central Intelligence Agency, the De-
defense Intelligence Agency, the National
Geospatial-Intelligence Agency, or the National
Security Agency; or

“(II) as determined by the President, any
Executive agency or unit thereof the principal
function of which is the conduct of foreign in-
telligence or counterintelligence activities, if the
determination (as that determination relates to
a personnel action) is made before that per-
sonnel action; or”.

SEC. 7. DISCIPLINARY ACTION.

Section 1215(a)(3) of title 5, United States Code, is
amended to read as follows:
“(3)(A) A final order of the Board may impose—

“(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

“(ii) an assessment of a civil penalty not to exceed $1,000; or

“(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

“(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under such paragraph (8) or (9) (as the case may be) was the primary motivating factor, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.”.

SEC. 8. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON REVOCATION OF SECURITY CLEARANCES.

(a) REQUIREMENT.—The Comptroller General shall conduct a study of security clearance revocations, taking effect after 1996, with respect to personnel that filed
claims under chapter 12 of title 5, United States Code, in connection therewith. The study shall consist of an examination of the number of such clearances revoked, the number restored, and the relationship, if any, between the resolution of claims filed under such chapter and the restoration of such clearances.

(b) REPORT.—Not later than 270 days after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a report on the results of the study required by subsection (a).

SEC. 9. ALTERNATIVE RECOURSE.

(a) IN GENERAL.—Section 1221 of title 5, United States Code, is amended by adding at the end the following:

“(k)(1) If, in the case of an employee, former employee, or applicant for employment who seeks corrective action (or on behalf of whom corrective action is sought) from the Merit Systems Protection Board based on an alleged prohibited personnel practice described in section 2302(b)(8), no final order or decision is issued by the Board within 180 days after the date on which a request for such corrective action has been duly submitted (or, in
the event that a final order or decision is issued by the Board, whether within that 180-day period or thereafter, then, within 90 days after such final order or decision is issued, and so long as such employee, former employee, or applicant has not filed a petition for judicial review of such order or decision under subsection (h)—

“(A) such employee, former employee, or applicant may, after providing written notice to the Board, bring an action at law or equity for de novo review in the appropriate United States district court, which shall have jurisdiction over such action without regard to the amount in controversy; and

“(B) in any such action, the court—

“(i) shall apply the standards set forth in subsection (e); and

“(ii) may award any relief which the court considers appropriate, including any relief described in subsection (g).

“(2) For purposes of this subsection, the term ‘appropriate United States district court’, as used with respect to an alleged prohibited personnel practice, means the United States district court for the district in which the prohibited personnel practice is alleged to have been committed, the judicial district in which the employment records relevant to such practice are maintained and ad-
ministered, or the judicial district in which resides the em-
ployee, former employee, or applicant for employment al-
legedly affected by such practice.

“(3) This subsection applies with respect to any ap-
peal, petition, or other request for corrective action duly
submitted to the Board, whether pursuant to section
1214(b)(2), the preceding provisions of this section, sec-
tion 7513(d), or any otherwise applicable provisions of
law, rule, or regulation.”.

(b) REVIEW OF MSPB DECISIONS.—Section 7703(b)
of such title 5 is amended—

(1) in the first sentence of paragraph (1), by
striking “the United States Court of Appeals for the
Federal Circuit” and inserting “the appropriate
United States court of appeals”; and

(2) by adding at the end the following:

“(3) For purposes of the first sentence of paragraph
(1), the term ‘appropriate United States court of appeals’
means the United States Court of Appeals for the Federal
Circuit.”.

(c) CONFORMING AMENDMENTS.—

(1) Section 1221(h) of such title 5 is amended
by adding at the end the following:

“(3) Judicial review under this subsection shall not
be available with respect to any decision or order as to
which the employee, former employee, or applicant has
filed a petition for judicial review under subsection (k).”.

(2) Section 7703(c) of such title 5 is amended
by striking “court.” and inserting “court, and in the
case of a prohibited personnel practice described in
section 2302(b)(8) brought under any provision of
law, rule, or regulation described in section
1221(k)(3), the employee or applicant shall have the
right to de novo review in accordance with section
1221(k).”.

SEC. 10. NATIONAL SECURITY WHISTLEBLOWER RIGHTS.

(a) In General.—Chapter 23 of title 5, United
States Code, is amended by inserting after section 2303
the following:

“§ 2303a. National security whistleblower rights

“(a) Prohibition of Reprisals.—

“(1) In General.—In addition to any rights
provided in section 2303 of this title, title VII of
Public Law 105–272, or any other provision of law,
an employee, former employee, or applicant for em-
ployment in a covered agency may not be dis-
charged, demoted, or otherwise discriminated
against (including by denying, suspending, or revok-
ing a security clearance, or by otherwise restricting
access to classified or sensitive information) as a re-
prisal for making a disclosure described in para-

graph (2).

“(2) DISCLOSURES DESCRIBED.—A disclosure
described in this paragraph is any disclosure of cov-
ered information which is made—

“(A) by an employee, former employee, or
applicant for employment in a covered agency
(without restriction as to time, place, form, mo-
tive, context, or prior disclosure made to any
person by an employee, former employee, or ap-
plicant, including a disclosure made in the
course of an employee’s duties); and

“(B) to an authorized Member of Con-
gress, an authorized official of an Executive
agency, an authorized official of the Depart-
ment of Justice, or the Inspector General of the
covered agency in which such employee is em-
ployed, such former employee was employed, or
such applicant seeks employment.

“(b) INVESTIGATION OF COMPLAINTS.—An em-
ployee, former employee, or applicant for employment in
a covered agency who believes that such employee, former
employee, or applicant has been subjected to a reprisal
prohibited by subsection (a) may submit a complaint to
the Inspector General and the head of the covered agency.
The Inspector General shall investigate the complaint and, unless the Inspector General determines that the complaint is frivolous, submit a report of the findings of the investigation within 120 days to the employee, former employee, or applicant and to the head of the covered agency.

“(c) Remedy.—

“(1) Within 180 days of the filing of the complaint, the head of the covered agency shall, taking into consideration the report of the Inspector General under subsection (b) (if any), determine whether the employee, former employee, or applicant has been subjected to a reprisal prohibited by subsection (a), and shall either issue an order denying relief or shall implement corrective action to return the employee, former employee, or applicant, as nearly as possible, to the position he would have held had the reprisal not occurred, including voiding any directive or order denning, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, as well as providing back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages including attorney’s fees and costs. If the head of the covered agency issues an order denying relief,
he shall issue a report to the employee, former em-
ployee, or applicant detailing the reasons for the de-
nial.

“(2)(A) If the head of the covered agency, in
the process of implementing corrective action under
paragraph (1), voids a directive or order denying,
suspending, or revoking a security clearance or oth-
erwise restricting access to classified or sensitive in-
formation that constituted a reprisal, the head of the
covered agency may re-initiate procedures to issue a
directive or order denying, suspending, or revoking
a security clearance or otherwise restricting access
to classified or sensitive information only if those re-
initiated procedures are based exclusively on national
security concerns and are unrelated to the actions
constituting the original reprisal.

“(B) In any case in which the head of a covered
agency re-initiates procedures under subparagraph
(A), the head of the covered agency shall issue an
unclassified report to its Inspector General and to
authorized Members of Congress (with a classified
annex, if necessary), detailing the circumstances of
the agency’s re-initiated procedures and describing
the manner in which those procedures are based ex-
clusively on national security concerns and are unre-
lated to the actions constituting the original reprisal.

The head of the covered agency shall also provide periodic updates to the Inspector General and authorized Members of Congress detailing any significant actions taken as a result of those procedures, and shall respond promptly to inquiries from authorized Members of Congress regarding the status of those procedures.

“(3) If the head of the covered agency has not made a determination under paragraph (1) within 180 days of the filing of the complaint (or he has issued an order denying relief, in whole or in part, whether within that 180-day period or thereafter, then, within 90 days after such order is issued), the employee, former employee, or applicant for employment may bring an action at law or equity for de novo review to seek any corrective action described in paragraph (1) in the appropriate United States district court (as defined by section 1221(k)(2)), which shall have jurisdiction over such action without regard to the amount in controversy. A petition to review a final decision under this paragraph shall be filed in the United States Court of Appeals for the Federal Circuit.
“(4) An employee, former employee, or applicant adversely affected or aggrieved by an order issued under paragraph (1), or who seeks review of any corrective action determined under paragraph (1), may obtain judicial review of such order or determination in the United States Court of Appeals for the Federal Circuit. No petition seeking such review may be filed more than 60 days after issuance of the order or the determination to implement corrective action by the head of the agency. Review shall conform to chapter 7.

“(5)(A) If, in any action for damages or relief under paragraph (3) or (4), an Executive agency moves to withhold information from discovery based on a claim that disclosure would be inimical to national security by asserting the privilege commonly referred to as the ‘state secrets privilege’, and if the assertion of such privilege prevents the plaintiff from establishing an element in support of the plaintiff’s claim, the court shall resolve the disputed issue of fact or law in favor of the plaintiff, provided that an Inspector General investigation under subsection (b) has resulted in substantial confirmation of that element, or those elements, of the plaintiff’s claim.
“(B) In any case in which an Executive agency asserts the privilege commonly referred to as the ‘state secrets privilege’, whether or not an Inspector General has conducted an investigation under subsection (b), the head of that agency shall, at the same time it asserts the privilege, issue a report to authorized Members of Congress, accompanied by a classified annex if necessary, describing the reasons for the assertion, explaining why the court hearing the matter does not have the ability to maintain the protection of classified information related to the assertion, detailing the steps the agency has taken to arrive at a mutually agreeable settlement with the employee, former employee, or applicant for employment, setting forth the date on which the classified information at issue will be declassified, and providing all relevant information about the underlying substantive matter.

“(d) Applicability to Non-Covered Agencies.—An employee, former employee, or applicant for employment in an Executive agency (or element or unit thereof) that is not a covered agency shall, for purposes of any disclosure of covered information (as described in subsection (a)(2)) which consists in whole or in part of classified or sensitive information, be entitled to the same pro-
tections, rights, and remedies under this section as if that Executive agency (or element or unit thereof) were a covered agency.

“(e) CONSTRUCTION.—Nothing in this section may be construed—

“(1) to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or (d) of this section or to modify or derogate from a right or remedy otherwise available to an employee, former employee, or applicant for employment; or

“(2) to preempt, modify, limit, or derogate any rights or remedies available to an employee, former employee, or applicant for employment under any other provision of law, rule, or regulation (including the Lloyd-La Follette Act).

No court or administrative agency may require the exhaustion of any right or remedy under this section as a condition for pursuing any other right or remedy otherwise available to an employee, former employee, or applicant under any other provision of law, rule, or regulation (as referred to in paragraph (2)).

“(f) DEFINITIONS.—For purposes of this section—
“(1) the term ‘covered information’, as used with respect to an employee, former employee, or applicant for employment, means any information (including classified or sensitive information) which the employee, former employee, or applicant reasonably believes evidences—

“(A) any violation of any law, rule, or regulation; or

“(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

“(2) the term ‘covered agency’ means—

“(A) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and the National Reconnaissance Office; and

“(B) any other Executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii)(II) to have as its principal function the conduct of foreign intelligence or counterintelligence activities;

“(3) the term ‘authorized Member of Congress’ means a member of the House Permanent Select
Committee on Intelligence, the Senate Select Committee on Intelligence, the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the committees of the House of Representatives or the Senate that have oversight over the program about which the covered information is disclosed;

“(4) the term ‘authorized official of an Executive agency’ shall have such meaning as the Office of Personnel Management shall by regulation prescribe, except that such term shall, with respect to any employee, former employee, or applicant for employment in an agency, include—

“(A) the immediate supervisor of the employee or former employee and each successive supervisor (immediately above such immediate supervisor) within the employee’s or former employee’s chain of authority (as determined under such regulations); and

“(B) the head, general counsel, and ombudsman of such agency; and

“(5) the term ‘authorized official of the Department of Justice’ means any employee of the Department of Justice, the duties of whose position include
the investigation, enforcement, or prosecution of any
law, rule, or regulation.”.

(b) CLERICAL AMENDMENT.—The table of sections
for chapter 23 of title 5, United States Code, is amended
by inserting after the item relating to section 2303 the
following:

“2303a. National security whistleblower rights.”.

SEC. 11. ENHANCEMENT OF CONTRACTOR EMPLOYEE
WHISTLEBLOWER PROTECTIONS.

(a) CIVILIAN AGENCY CONTRACTS.—Section 315(c)
of the Federal Property and Administrative Services Act
of 1949 (41 U.S.C. 265(c)) is amended—

(1) in paragraph (1), by striking “If the head”
and all that follows through “actions:” and inserting
the following: “Not later than 180 days after sub-
mission of a complaint under subsection (b), the
head of the executive agency concerned shall deter-
mine whether the contractor concerned has subjected
the complainant to a reprisal prohibited by sub-
section (a) and shall either issue an order denying
relief or shall take one or more of the following ac-
tions:”; and

(2) by redesignating paragraph (3) as para-
graph (4) and adding after paragraph (2) the fol-
lowing new paragraph (3):
“(3) If the head of an executive agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.”.

(b) ARMED SERVICES CONTRACTS.—Section 2409(c) of title 10, United States Code, is amended—

(1) in paragraph (1), by striking “If the head” and all that follows through “actions:” and inserting the following: “Not later than 180 days after submission of a complaint under subsection (b), the head of the agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:”; and
(2) by redesignating paragraph (3) as paragraph (4) and adding after paragraph (2) the following new paragraph (3):

“(3) If the head of an agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.”.

SEC. 12. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

(a) In general.—Chapter 23 of title 5, United States Code, is amended—

(1) by redesignating sections 2304 and 2305 as sections 2305 and 2306, respectively; and

(2) by inserting after section 2303a (as inserted by section 10) the following:
$2304. Prohibited personnel practices affecting the Transportation Security Administration

(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

(1) the provisions of section 2302(b)(1), (8), and (9);

(2) any provision of law implementing section 2302(b)(1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

(c) EFFECTIVE DATE.—This section shall take effect as of the date of the enactment of this section.”.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 23 of title 5, United States Code, is amended by striking the items relating to sections 2304 and 2305, respectively, and by inserting the following:
SEC. 13. CLARIFICATION OF WHISTLEBLOWER RIGHTS RELATING TO SCIENTIFIC AND OTHER RESEARCH.

Section 2302 of title 5, United States Code, is amended by adding at the end the following:

“(f) As used in section 2302(b)(8), the term ‘abuse of authority’ includes—

“(1) any action that compromises the validity or accuracy of federally funded research or analysis; and

“(2) the dissemination of false or misleading scientific, medical, or technical information.”.

SEC. 14. EFFECTIVE DATE.

This Act shall take effect 30 days after the date of the enactment of this Act, except as provided in the amendment made by section 12(a)(2).